Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

No. 08-220

IN THE

Supreme Court of the United States

DANA GRESBACH,

Petitioner,

v.

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C, and IAN W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner

218569

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Respondents waived any issue of waiver concerning the application of the special needs doctrine when the Respondent failed to argue waiver before the Court of Appeals decided the merits of the special needs issue.

ARGUMENT

A. Because Respondents Chose To Not Argue Waiver At The Court Of Appeals, They Waived Any Issue Of Waiver.

Respondents argue that Petitioner waived review of the issue of whether the special needs doctrine is an exception to the Fourth Amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (Resp. Brief at 22-23). However, the parties argued this issue on the merits at the Court of Appeals, the Court of Appeals addressed the merits of this issue, and the Respondents chose to not raise the issue of waiver before the Court of Appeals. By not raising the issue of waiver at the Court of Appeals, Respondents waived any waiver argument they may have had.

It is well-settled that "a defense of waiver can itself be waived by not being raised." *Garlington v. O'Leary*, 879 F.2d 277, 282 (7th Cir. 1989); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1996). The Seventh Circuit has explained that where a party raises an argument for the first time on appeal, the court may consider that argument waived, but if the opposing party meets the issue on its merits without raising the issue of waiver, the waiver argument is waived. *Riemer v. Illinois Dept. of Trans.*, 148 F.3d 800, 805 n.4 (7th Cir. 1998).

At the Court of Appeals, Ms. Gresbach argued that the special needs doctrine is an exception to the fourth amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (Appellant's Brief, at 15-20). Respondents responded substantively as follows:

> Gresbach's discussion of the "special needs" exception to the Fourth Amendment hardly warrants a detailed response, especially in light of this Court's admonition in *Heck* that given the exigent circumstances exception, "there is no apparent justification for carving out a 'special needs' exception for child abuse investigations in this context."

(Respondents' Ct. App. Brief, at 14, n.19).

Respondents made no mention of waiver. The Seventh Circuit "hold[s] fast to the principle that a defense of waiver may itself be waived if not raised." *Westefer v. Snyder*, 422 F.3d 570, 584 n.20 (7th Cir. 2005). By simply attacking the merits of Ms. Gresbach's special needs argument and not raising the issue of waiver, Respondents waived any waiver argument they may have had.

B. The Supreme Court May Review Issues The Court Of Appeals Has Addressed.

The Court of Appeals ruled that the special needs doctrine was not an exception to the fourth amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (App. 15a-16a). The Supreme Court may review any "ground considered and passed upon by the court

below." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000). Thus, in a case where there was a question of whether a party properly raised an issue in the district court, the Court concluded that "[t]hough we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also." *On Lee v. United States*, 343 U.S. 747, 750 n.3 (1952). Conversely, the Court refrains "from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) *citing Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) (*per curiam*); *see Schiro v. Farley*, 510 U.S. 222, 228 (1994) ("We ordinarily do not review claims made for the first time in this Court.").[1]

In the present case, because the parties argued the merits of the special needs issue at the Court of Appeals without objection, and the Court of Appeals has addressed the merits of the special needs issue, there is no procedural impediment to review. The Petitioner provides no authority for the proposition that the Court may not review an issue the Court of Appeals has substantively addressed. Instead, the Petitioners merely cite to *Danforth v. Minnesota*, __U.S. __, 128 S. Ct. 1029, 1046 (2008), and *Sosna v. Iowa*, 419 U.S. 393, 396 (1975). Neither case advances Respondents' position. *Danforth* articulates the general and limited proposition that a

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1. The practice of not addressing issues not raised in the Court of Appeals "is not inflexible." *Youakim*, 425 U.S. at 234. Thus, in exceptional cases, issues not passed upon in a lower court may be reviewed. *Id.* In the present case, the issue was passed upon by the Court of Appeals.

party may waive an untimely raised issue. *See id.* *Danforth* does not state that an issue the Court of Appeals has addressed on the merits may be inappropriate for Supreme Court review. *Sosna* does not advance Respondents' argument either. *Sosna* addresses whether a state may waive the defense of sovereign immunity if the issue is not first raised in the district court. In that case, the Court concluded that "the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court." *Id.* at n.2 (citations omitted). Respondents' argument that the Court cannot review an issue addressed on the merits by the Court of Appeals is not supported by any authority and should be rejected.

Respondents offer no cogent explanation as to why the Court should not review a legal issue which the Court of Appeals has addressed on the merits. Respondents concede that the Court has a sufficient factual foundation for its legal analysis. In fact, according to the Respondents, the Court can analyze the special needs issue "under any set of data." (Resp. Brief at 23). Although Respondents complain that they failed to develop countervailing policy arguments below, (*id.*), Respondents are solely responsible for their strategic decision to not raise a waiver objection as well as their decision to not develop any policy arguments before the Court of Appeals. Respondents offer no reason why they cannot develop any policy arguments they may have at this stage.

Respondents have not even attempted to explain what interests could possibly be promoted by a rule which would allow one party to obtain the benefit of an appellate decision on the merits but would deprive the other party of the opportunity for review. Because Respondents offer no authority or even any theory as to why waiver should apply under these circumstances, the Court should reject their argument.

CONCLUSION

Respondents waived any issue of waiver, and the Court of Appeals addressed the merits of the special needs issue. The Supreme Court should reject Respondents' waiver argument so the Court can settle the conflict in the lower courts as to the issue of whether the special needs doctrine applies as an exception to the Fourth Amendment's warrant requirement in non-law enforcement investigations of child abuse, and to provide crucial guidance to child protective services workers around the country in conducting the millions of investigations performed annually.

Respectfully submitted,

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner